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Nos. 99-603 & 99-960

In the

Supreme Court of the United States

LEGAL SERVICES CORPORATION,
Petitioner,
v.
CARMEN VELAZQUEZ,
Respondent.

UNITED STATES,
Petitioner,
v.
CARMEN VELAZQUEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF LEGAL SERVICES CORPORATION

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INTEREST OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioners Legal Services Corporation and United States of America.[1] All parties consented to the filing of this brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has adopted a legal policy objective that, in our representative democracy, government agencies should be required to operate within strictly defined constitutional and statutory limits. To that end, PLF is submitting this brief to provide an additional viewpoint with respect to the issues presented. PLF is particularly concerned that attorney and judicial activists be restrained from expanding federal welfare spending not merely beyond its intended purposes, but in direct contravention of its specified purposes.

OPINION BELOW

The opinion below is reported as *Velazquez v. Legal Services Corporation*, 164 F.3d 757 (2d Cir. 1999).

STATEMENT OF THE CASE

The Legal Services Corporation (LSC) is a nonprofit corporation created by the Legal Services Corporation Act of 1974 (LSCA), 42 U.S.C. § 2996, *et seq.*,"for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford

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[1] Pursuant to Supreme Court Rule 37.6, Amicus affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

legal assistance." *Id.* § 2996b(a). LSC makes and administers grants of funds, appropriated by Congress, to local organizations that in turn provide free legal assistance to indigent clients. Many LSC grantees receive funding through other public or private sources as well as the federal LSC funds. *Velazquez*, 164 F.3d at 759.

From its beginnings, the LSC program has restricted LSC grantees in the use of LSC funds. Grantees have been prohibited from using LSC funds, for example, in criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation or military desertion. *Id.* at 759-60. The restrictions on LSC grantees were expanded by the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA) Pub. L. No. 104-34, § 504, reenacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1997, Pub. L. No. 104-208, § 502. OCRAA § 504 prohibits using LSC funds to aid entities that engage in various activities including lobbying, class actions, assisting aliens in certain categories, supporting advocacy training programs, collecting attorneys' fees, prisoner litigation, and pursuing welfare reform. *Velazquez*, 164 F.3d at 759-60.

Specifically, the welfare reform provision states: "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . ."

> (16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such

> relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation . . . .

OCRAA, § 504(a)(16); *Velazquez*, 164 F.3d at 760.

This prohibition extends not only to LSC funds, but to funds from any source. OCRAA provides that although LSC recipients may "use funds received from a source other than the Legal Services Corporation to provide legal assistance, . . . such funds may not be expended by recipients for any purpose prohibited by this Act." *Id.* § 504(d)(2)(b); *Velazquez*, 164 F.3d at 760.

Plaintiffs filed suit in January, 1997, charging that the restrictions on the use of nonfederal funds violated their rights under the First, Fifth, and Tenth Amendments to the United States Constitution. Plaintiffs sought a preliminary injunction to bar restrictions on the use of nonfederal funds. *Velazquez*, 164 F.3d at 761. The district court denied the injunction and, on appeal, the United States Second Circuit Court of Appeals reversed as to the welfare benefits portion of OCRAA. The Second Circuit, with Judge Jacobs dissenting, found that Section 504(a)(16) "unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law." 164 F.3d at 772. This Court granted certiorari.

SUMMARY OF ARGUMENT

In providing funding to LSC grantees, Congress has chosen to fund selectively certain legal services to the express exclusion of others, including challenges to welfare reform statutes. Under this Court's precedents, this is not unconstitutional "viewpoint discrimination," but merely an appropriate legislative determination that the legal needs of the indigent are best served by attention to securing their rights under existing law, rather than expensive and time-consuming challenges to the law.

In striking down the welfare reform litigation exclusion, the Second Circuit ignored its own holdings and the holdings of this Court that permit Congress to exclude funding for particular purposes so long as alternative procedures are available. The Second Circuit failed to consider that welfare reform laws are subject to challenge by non-LSC funded sources such as public interest law firms and pro bono lawyers.

ARGUMENT

I

FUNDING OF LSC GRANTEES TO REPRESENT WELFARE CLIENTS DOES NOT CREATE A PUBLIC FORUM

This Court held in *Rust v. Sullivan,* 500 U.S. 173, 191 (1991), "a decision to declare an Act of Congress unconstitutional 'is the gravest and most delicate duty that this Court is called on to perform.'" The Second Circuit in its ruling gave very little thought to this basic principle of separation of powers.

In striking down the limitation on challenges to welfare reform laws, the Second Circuit read Section 504(a)(16) to mean

> representation of a client seeking a welfare benefit is permitted, but only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits. The grantee thus could not argue that the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution. Such representation is permitted only if it includes no challenge to the underlying law.

Velazquez, 164 F.3d at 769.

In finding that the welfare reform limitation violated the First Amendment, the Second Circuit gave a cursory examination to controlling law. Thus, the court acknowledged that *Rust v. Sullivan*, 500 U.S. 173, upheld regulations forbidding recipients of government funds for family planning from counseling or advocacy related to abortion and that *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), upheld a requirement that the National Endowment for the Arts (NEA), in making grants for the arts based on excellence, take "into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Id.* at 572. *Velazquez*, 164 F.3d at 770. In attempting to distinguish *Rust* and *Finley*, the Second Circuit stated its view that the ability of a lawyer to argue that a statute, rule or governmental practice barring a client's claim is unconstitutional "falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art." *Velazquez*, 164 F.3d at 771.

The court found this limitation was not "viewpoint neutral" because it permits funding to those who represent clients without challenging existing laws, but denies funding to those whose representation challenges existing rules. *Id.* at 769-70. As the court put it:

> It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint . . . .

Id. at 770.

A. The *Rosenberger* Rule Does Not Apply to the Provision of Legal Services

The court ruled that government discrimination against speech because of its message is suspect under the First Amendment, *id.* citing *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). In *Rosenberger*, this Court struck down on First Amendment

'grounds a provision of a governmental grant program to support student publications that excluded from eligibility publications that expressed a viewpoint on religion. *Id.* at 837.

However, as stated in *Legal Aid Society of Hawaii v. Legal Services Corporation,* 145 F.3d 1017, 1028 (9th Cir. 1998), (*LASH*), the "analogy to *Rosenberger* is not persuasive." Justice White, speaking for the unanimous Ninth Circuit panel, held:

> The government in *Rosenberger* "expended funds to encourage a diversity of views from private speakers, *id.* at 834, unlike the LSC program where "the government [has] appropriated public funds to promote a particular policy of its own," *id.* at 833. Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas.

Id. at 1028.

The inapplicability of *Rosenberger* was further explained in *National Endowment for the Arts v. Finley*, 524 U.S. 569. There, this Court rejected a First Amendment challenge to a statutory directive for the NEA to ensure that

> artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d)(1). This Court noted:

> In *Rosenberger*, a public university declined to authorize disbursements from its Student Activities Fund to finance the printing of a Christian student newspaper. We held that by subsidizing the Student Activities Fund, the University had created a limited

> public forum, from which it impermissibly excluded all publications with religious editorial viewpoints.

Rosenberger, 515 U.S. at 837.

Here, by contrast, in subsidizing legal assistance for indigents, Congress was not creating a public forum, limited or otherwise. The mandate of LSC is to provide legal representation to the poor for certain purposes, to the exclusion of certain specified areas of representation, whether it be criminal proceedings or challenges to welfare reform.

B. The Role of LSC Attorneys Is to Represent Clients' Rights Under Existing Law, Not to Create a Public Forum for Discussion of National Issues

The court below sets up a straw argument that Congress could not lawfully fund institutions set up to study the Nation's foreign or domestic policies, conditioned on the grantees not criticizing, or advocating change in, the policies of the government. *Velazquez*, 164 F.3d at 771. The fallacy of the court's analogy is that LSC grantees are not being paid to study welfare reform in order to report to the Nation on it. They are being paid, if they choose to involve themselves, to represent their clients' rights under welfare reform statutes or rules as they are written. They are not being paid to present a diversity of views on the topic of welfare reform.

Justice White put the matter into sharp focus in *LASH*, 145 F.3d at 1028:

> Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas.

To similar effect, this Court declared in *Finley:*

> In the context of arts funding, in contrast to many other subsidies, the Government does not

> indiscriminately "encourage a diversity of views from private speakers," *id.* at 834. The NEA's mandate is to make aesthetic judgments, and the inherently content-based "excellence" threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations that were "'related to the educational purpose of the University,'" *id.* at 824 —and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to "'all newspapers and other periodical publication.'"

Id. at 586 (citations omitted).

In imposing the welfare reform limitation, Congress obviously intended that LSC grantees not divert their attention from the individual legal needs of their clients in order to conduct a public forum or crusade, however, emotionally rewarding that may be for the LSC attorneys. What Congress intends is that someone do the drudge work of representing indigent clients' individual interests under the laws as they presently exist. If LSC attorneys cannot restrict themselves to these duties they are free to seek other employment with private or public interest law firms that have no such restrictions.

This Court summarized the issue in *Finley*:

> Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.

> *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). In the 1990 Amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA's enabling act to provide that arts funding should "contribute to public support and confidence in the use of taxpayer funds," and that "public funds . . . must ultimately serve public purposes the Congress defines." § 951(5).

Id. at 587-88.

Here, Congress has defined the public purpose of LSC to exclude funding of legal challenges to welfare reform. And to make the matter absolutely clear, *Finley, id.* at 558, quoted *Rust*, 500 U.S. at 193, in holding that

> Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." In doing so, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."

The Second Circuit's response to this statement is "we doubt that these words can be reliably taken at face value." *Velazquez*, 164 F.3d at 770. This kind of judicial arrogance defies further comment. Here, Congress has chosen to selectively fund representation of welfare recipients so long as that representation does not encompass a challenge to existing laws. Under the *Rust* and *Finley* precedents, this exclusion is not viewpoint discrimination, it is merely the legislative choice as to how the welfare population may be most effectively represented by LSC grantees.

II

THE SECOND CIRCUIT IGNORED THE ALTERNATIVES TO LSC-FUNDED CHALLENGES TO WELFARE REFORM

A. The Second Circuit Ignored Its Own Rulings on Congressional Restrictions on Federally Funded Services

In dismissing the *Rust* and *Finley* precedents, the Second Circuit declared that the fact that "Congress can make grants that favor family planning over abortion, or that favor decency over indecency, in no way suggests" that Congress may make grants funding legal representation of welfare applicants that "bar the attorney from arguing the unconstitutionality or illegality of whatever rule blocks the client's success." *Velazquez*, 164 F.3d at 771. The court then proclaimed: "Such a restriction is a close kin to those 'calculated to drive "certain ideas or viewpoints from the marketplace."' *Finley*, 118 S. Ct at 2179." *Velazquez*, 164 F.3d at 771-72.

In so stating, the court ignored what it had ruled earlier in the case. For example, the court noted that

> the LSCA has always limited the range of legal services available through LSC grantees. See 42 U.S.C. § 2996i(c). Indeed, grantees have historically limited their representations to selected issues, and are typically "able to meet only a fraction of the demand for their services." Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services.

Id. at 765 (citation omitted).

The court went on to observe:

> Nor do plaintiffs provide any basis to question the validity of the scheme itself. Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted. We find, therefore, that Congress was within its power to limit the scope of legal services available under the LSCA.

Id. The court made no attempt to explain why this standard did not apply to the welfare benefits litigation exclusion of Section 504(a)(16).

The court then discussed *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), wherein a nonprofit organization challenged Section 501(c)(3) of the Internal Revenue Code which prohibited organizations engaged in lobbying from receiving tax-deductible contributions. The Second Circuit noted that in upholding this limitation the opinion relied upon the fact that the Internal Revenue Code allowed Section 501(c)(3) organizations to establish financially independent lobbying affiliated under Section 501(c)(4) without jeopardizing their eligibility for tax-deductible contributions. *Regan,* 461U.S. at 544. *Velazquez*, 164 F.3d at 765.

The Second Circuit also considered *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984), in which this Court invalidated a condition denying federal funds to public stations that engaged

in editorializing. This Court there found that Congress could cure the statute by amending it to permit stations to establish affiliates which could use the stations' facilities to editorialize with nonfederal funds. *Id.* at 400. *Velazquez*, 164 F.3d at 765-66.

The Second Circuit also discussed *Rust*, 500 U.S. 173, in this context, stating:

> In *Rust,* as in the instant case, "program integrity" regulations required separation of facilities, personnel and records between Title X providers and any medical provider dispensing abortion information. *See id.* at 180-81.

Velazquez, 164 F.3d at 766. The court noted that both under Title X and OCRAA, grantees could provide restricted activities if separate entity requirements were met. *Id.* at 767 n.5.

The Second Circuit concluded upon consideration of these cases that

> in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression.

Id. at 766. That should have confirmed the constitutionality of the statute.

B. The Second Circuit Failed to Consider the Alternatives Available to Welfare Recipients Seeking to Challenge the Law

Notwithstanding its own analysis and that of the cases it had just relied on, the Second Circuit invalidated the welfare benefits litigation limitation, overlooking the dispositive criteria

set forth by this Court. The Ninth Circuit in *LASH* pointed out the obvious factors that were ignored by the court below:

> First, a recipient is not compelled to accept a subsidy from the LSC. A recipient can decline the federal subsidy and avoid being subject to the restrictions. *See, Rust,* 500 U.S. at 199 n.5; *Grove City College v. Bell,* 465 U.S. 555, 575 (1984) (conditioning federal assistance on compliance with a federal program does not violate petitioner's First Amendment rights because the recipient "may terminate its participation in the [program] and thus avoid the requirements of [the program]"). By choosing to accept LSC funds, "a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income," *Rust,* 500 U.S. at 199 n.5. Second, the LSC regulations only govern recipients of LSC funds and any related entities that fail to satisfy the program integrity requirements. If the recipient wishes to engage in prohibited activities, it remains free to use private funds to finance these activities if it complies with the separation requirements of § 1610.8.

145 F.3d.

The Second Circuit, in failing to consider these criteria, missed the point that because welfare rules may not be challenged by LSC grantees, it does not mean they must go unchallenged. State and local governments, public interest law firms, pro bono practitioners, among a myriad of legal sources, are available to challenge unlawful welfare rules and statutes. None of these alternative resources were contemplated by the Second Circuit's limited view of the law.

Instead, the panel majority took issue with Judge Jacob's dissent that the statute merely prohibits LSC lawyers from taking on certain representations. The majority opined that

"[a]s a practical matter, a lawyer often will not know in advance what arguments must be raised to counter those raised by the opposition as the litigation progresses." *Velazquez*, 164 F.3d at 772. Since the arguments in question would be the constitutionality of welfare reform laws that preclude or limit benefits to the potential client, this type of matter is highly unlikely to be raised by the opposition. Rather, it is likely to be raised, if at all, in the first instance by the plaintiff. And it would be an ill-schooled attorney indeed who failed to realize at the initial client interview that the bar to the client's claim was a welfare reform law, the validity of which must be challenged in order for the client to prevail. At that point, the LSC attorney is bound by law and ethics to decline representation. But that does not create a constitutional violation. As the majority said in an earlier context:

> We find that plaintiffs' allegations are insufficient to sustain a facial challenge. It may be, as plaintiffs urge, that the program integrity rules will, in the case of some recipients, prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers. . . . Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms.

Id. at 767. The court should have taken its own counsel with regard to the facial attack on Section 504(a)(16). There is no

evidence to support the court's prediction that counsel will be unable to determine that a case falls within the excluded category and decline representation. The plaintiffs' facial attack should have been rejected out of hand.

C. LSC Clients Are No More Disadvantaged by the Exclusion Than if Congress Had Not Provided Any Funding for Legal Services

This Court noted in *Harris v. McRae*, 448 U.S. 297, 314 (1980):

> An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.

Here, indigents desiring to challenge the constitutionality of welfare laws similarly suffer no disadvantage if LSC grantees may not represent the indigent in such challenges. The indigent continues, as before, to be dependent on the private sources noted above for those services or, as *McRae* summarized, *id.* at 317, the exclusion

> leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have if Congress had chosen to subsidize no health care costs at all.

Welfare recipients similarly are left with the same range of choice in deciding whether to challenge welfare reform laws as they would have if Congress had made the determination not to subsidize LSC at all. As with the circumstances in *McRae*, there is nothing unconstitutional in this statutory exclusion.

CONCLUSION

In exercising its legislative discretion, Congress determined that the needs of welfare recipients would be best served if LSC attorneys concentrated on representing the individual interests of those recipients under existing law. Therefore, Congress directed that LSC grantees not engage in such glamorous, expensive and resource-consuming exercises as class actions and challenging the constitutionality of welfare reform laws. Such laws may be alternatively challenged, of course, by other legal representatives of welfare recipients such as public interest law firms or pro bono counsel. Because these alternatives exist, Congress is free to restrict LSC grantees in the types of litigation which they may conduct without violating the First Amendment. The opinion of the Second Circuit should therefore be reversed.

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Respectfully submitted,

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